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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID PAUL STEIN,

Defendant and Appellant.

D055159

(Super. Ct. No. SCD214800)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsens, Judge. Affirmed.

David Paul Stein pleaded guilty to six counts of lewd acts with a child, involving the fondling of his 13-year-old foster daughter's breasts and buttocks. At the time of the plea, the trial court committed to a six-year lid on any prison sentence, and indicated it had the authority to consider probation. At the sentencing hearing, the trial court denied probation and sentenced Stein to three years in prison. Stein appeals, contending the trial court abused its discretion when it sentenced him to prison without ordering a psychological evaluation under Penal Code section 288.1 to assess his eligibility for probation. (Undesignated

statutory references are to the Penal Code.) We conclude the trial court was not required to order a section 288.1 report before finding Stein ineligible for probation.

SENTENCING HEARING

At the beginning of the sentencing hearing, the trial court indicated that it had read all relevant materials and commented about the case to assist counsel in focusing their arguments. After hearing the arguments of counsel, the trial court found that the victim was more vulnerable than most children because she had previously been sexually abused and had a history of dealing with her emotions by cutting herself. It concluded that Stein took advantage of a position of trust and acted reprehensibly by attempting to disguise his sexually related activity as a playful game. The court also noted that the victim needed to know that Stein's conduct was criminal and worthy of a prison term. It then denied probation finding "that the circumstances which support a denial of probation outweigh the circumstances supporting a grant of probation. So that even if I were to make the positive findings on all the [section] 1203.066 criteria, I would still make the same decision, that is to send [Stein] to prison."

DISCUSSION

All defendants are eligible for probation, in the discretion of the sentencing court, unless a statute provides otherwise. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Stein concedes that due to his convictions, he was presumptively ineligible for probation unless the following criteria were met: (1) probation was in the best interest of the child victim; (2) his rehabilitation was feasible, he was amenable to treatment and would be placed in an appropriate treatment program while on probation; (3) he was removed from the

victim's household; and (4) there was no threat of physical harm to the victim if he received probation. (§ 1203.066, subd. (d)(1)(A)-(D).)

The trial court acknowledged at the sentencing hearing that it *could* grant probation if it made certain findings under section 1203.066, but even if it made these findings it would send Stein to prison. Significantly, Stein does not assert the trial court abused its discretion when it concluded that the standard probation criteria did not justify a grant of probation. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 [defendant has the burden to clearly show that the denial of probation was irrational or arbitrary].) Rather, Stein asserts the trial court erred by failing to order a psychological report under section 288.1 prior to denying probation. We reject his assertion.

Section 288.1 provides that a person convicted of committing any lewd or lascivious act on a child under the age of 14 "shall not have his or her sentence suspended until the court obtains a report . . . as to the mental condition of that person." The court in *People v. Thompson* (1989) 214 Cal.App.3d 1547 (*Thompson*) concluded that under the clear language of the statute, a section 288.1 report is not mandated in every lewd or lascivious act case. (*Id.* at p. 1549.) The trial court must order a psychological report under section 288.1 only if it is inclined to grant probation. If the court is not inclined to grant probation, it has no duty to order a section 288.1 report. (*Ibid.*) "In other words, if after reviewing all the facts, the presentence report and the statements in mitigation and aggravation, the court does not feel that probation is proper, then there is no duty to request a section 288.1 report." (*Ibid.*)

Here, defense counsel never mentioned obtaining a section 288.1 report at the sentencing hearing for the obvious reason that the court was *not* inclined to grant probation

at that time, even if it made positive findings on all the 1203.066 criteria. Significantly, the purpose of a section 288.1 report is not to aid the defendant in an attempt to obtain probation; it is to ensure the protection of society by requiring a psychiatric or psychological report to determine whether a defendant is a suitable candidate for probation. (*Thompson, supra*, 214 Cal.App.3d at p. 1549.) Where, as here, the trial court does not intend to grant probation, and the record supports the denial, a section 288.1 report is not mandated. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.